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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAR 27 1997

*Federal Communications Commission
Office of Secretary*

In the Matter of)

Telecommunications Carriers' Use)
of Customer Proprietary Network Information)
and Other Customer Information)

CC Docket No. 96-115

FURTHER REPLY COMMENTS OF WORLDCOM

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WorldCom, Inc. ("WorldCom"), hereby files its further reply comments in response to the further comments on March 17, 1997 regarding the questions posed by the Common Carrier Bureau ("Bureau") in its Public Notice ("Notice"), DA 97-385, released on February 20, 1997 in the above-referenced proceeding.

I. INTRODUCTION AND SUMMARY

In its further comments in this proceeding, WorldCom stated that based on the BOCs' unique access to competitively-valuable and highly sensitive information about their customers, Congress established a clear dichotomy in the 1996 Act between the actions of the BOCs and their affiliates, and all other unaffiliated carriers, with regard to CPNI. In particular, while Section 222 establishes certain minimal requirements applicable to all common carriers in using and disclosing their customers' CPNI, Section 272 of the Act goes further to create unequivocal nondiscrimination requirements with which each BOC and its affiliates must comply in their provision or use of the CPNI of the BOC's customers. In responding to the Bureau's questions, WorldCom stressed that the Commission must devise federal CPNI rules that mirror this statutory dichotomy, and thereby not only protect consumer privacy but also do not allow

the incumbents to leverage CPNI to the advantage of their Section 272 affiliate.

Over a dozen parties filed further comments in this proceeding. The BOCs' own filings demonstrate once again their unparalleled ability to deny the obvious. Spinning arguments and crafting scenarios that distort the commonsense meaning of language, the BOCs seek to place their CPNI-related activities completely outside the reach of the nondiscrimination requirements of Section 272(c)(1) of the Act. Unfortunately for the BOCs, however, the rest of us can read.

Boiled down to its essence, the BOCs raise three primary arguments in their comments: (1) Section 272(c)(1) does not apply to the BOCs; (2) even if Section 272(c)(1) does apply to the BOCs, the provision still allows discriminatory conduct by the BOCs; and (3) even if Section 272(c)(1) prohibits discriminatory conduct by the BOCs, the joint marketing and sales provision of Section 272(g) "trumps" Section 272(c)(1). In its reply, WorldCom will focus first on the significant consumer and competitive implications of CPNI, and then on the BOCs' fallacious arguments against the application of Section 272(c)(1) to their CPNI-related activities.

II. BOC CONTROL OVER CPNI REQUIRES ADDITIONAL SAFEGUARDS TO PROTECT CONSUMERS AND ENSURE COMPETITIVE EQUITY

The BOCs first try to avoid statutory arguments altogether by challenging the Congressional policy that underpins Section 272(c)(1), namely, that the BOCs' exclusive control over sensitive, monopoly-derived information, including CPNI, necessitates additional safeguards above and beyond the requirements of Section 222. If successful in challenging the policy, the BOCs apparently believe they can render Section 272(c)(1) itself a nullity.

First, the BOCs argue that, based on a customer's "established relationship" with

a company, that same customer expects and even desires the company to use the customer's proprietary information in any way the company sees fit. From this general observation, Ameritech takes a large leap to suggest that "from a privacy perspective, customers' expectations are the same whether their CPNI is in the hands of" an ILEC, CLEC, or IXC.¹ BellSouth similarly states that customers expect that a business with whom a customer has an "established relationship" will use or share its information among its affiliates.² Some BOCs believe that this so-called "existing relationship" gives the BOCs carte blanche to do whatever they want with CPNI. Ameritech states, for instance, that because CPNI shared with a BOC affiliate "never leaves the BOC/affiliate corporate umbrella," the "internal use of that data does not violate the customer's privacy expectations."³ US West contends that the "critical... existing business relationship" between a BOC and its customer allows for a wide range of "tacit" and "implied" customer consents to a BOCs' use of CPNI.⁴ Indeed, US West goes even further to insist that customer expectations require that an approval process "cannot always be equal" as between BOCs and their affiliates, and BOCs and unaffiliated third parties.⁵

The BOCs' sweeping characterizations of their "existing business relationships" with customers ignore one crucial fact: a consensual relationship requires a voluntary connection between two parties. When a consumer freely chooses to take a service, as from an independent

¹ Ameritech Comments at 2.

² BellSouth Comments at 16.

³ Ameritech Comments at 6.

⁴ US West Comments at 6.

⁵ US West Comments at 5.

IXC or CLEC, that customer has selected from among other competitive options and decided to enter into a business relationship with that particular carrier. Such a relationship necessarily involves implied consent concerning use of sensitive customer-specific information. From the viewpoint of a BOC customer, however, who has no other choice of vendor for local telephone service, dealings with the local BOC cannot be deemed at all consensual or voluntary. Rather, ratepayers take local telephone service from the BOCs because there is no other choice: the BOC was granted a monopoly franchise in that region for such service. Thus, as WorldCom explained in its previous comments in this proceeding, any relationship between a BOC and its ratepaying community exists largely as the unwarranted fruits of monopoly, and is based on lack of customer choice in the marketplace.⁶

Any BOC-customer "relationship" built on compulsion, rather than freely-given choice, is not a relationship with implied consents worthy of protection by federal law. Interestingly, Congress has defined CPNI as information relating to a customer's use of telecommunications services "that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship...."⁷ Where that relationship is suspect because it is not the product of competitive choice, the imperative to protect the resulting CPNI is heightened considerably.

At the same time that the BOCs denigrate the privacy rights of their captive customers, they also attempt to downplay the competitive importance of the CPNI they have

⁶ See WorldCom Comments at 3-5; WorldCom Reply Comments at 10-12; WorldCom Further Comments at 1-3.

⁷ 47 U.S.C. § 222(f)(1)(A) (emphasis added).

been allowed to gather. For example, Ameritech asserts that "there is no reason to believe that a BOC possesses more or better CPNI" than any other carrier, and that, "from a competitive perspective," non-BOCs "are likely to possess CPNI about a far greater number of customers than any BOC."⁸ US West, too, explains that other telecommunications carriers frequently have possession of CPNI related to a nationwide customer base, unlike BOC CPNI "which is more regional in nature."⁹ This line of reasoning is completely irrelevant. Even if non-BOCs do have access to CPNI on a national basis, that is only because the BOCs are not yet allowed into the in-region long distance market. Far more important, however, is what CPNI the BOCs possess, and how they acquired it. The BOCs possess the CPNI of nearly every household and business within their region -- including competing local and long distance carrier customers -- and do so because those entities to date have not had any other option but to use the BOC.

In their further joint comments, Bell Atlantic and NYNEX unintentionally shed light on why equal, nondiscriminatory access to a BOC's CPNI is of "significant importance" to all carriers:

CPNI allows a carrier to target those customers who are most likely to be interested in particular new services and products, based upon their past purchasing habits, and to offer them packages of services tailored to their needs.... The inability to target an audience for particular products and services means that mass outbound telemarketing or direct mail solicitations would go to many customers which have little use or interest in the particular services being offered. This wastes the customers' time and makes effective marketing far more difficult. It also increases the carrier's marketing costs and, ultimately, raises prices to the customer.¹⁰

⁸ Ameritech Comments at 2.

⁹ US West Comments at 4.

¹⁰ Bell Atlantic/NYNEX Comments at 5.

Only the BOC is able to collect, access, and use CPNI derived ubiquitously from all consumers in its region. This enormous competitive advantage, if left unchecked, would make a mockery of the notion that robust local competition might ever develop.¹¹

By enacting Section 272(c)(1) of the 1996 Act, Congress obviously understood how BOC use of CPNI -- collected from unwilling customers and withheld from competing carriers -- raises serious privacy, discrimination, and equity concerns. Section 272(c)(1) provides an important pro-competitive and pro-consumer overlay on Section 222, one the BOCs cannot simply argue away on dubious policy grounds.

III. THE COMMISSION SHOULD NOT ACCEPT THE BOCs' CONVOLUTED ATTEMPTS TO EVADE THE DICTATES OF SECTION 272(c)(1)

Each of the BOCs dutifully notes the plain statutory language of Section 272(c)(1) mandating that a BOC, "in its dealings with its affiliate... may not discriminate between... that affiliate and any other entity in the provision or procurement of goods, services, facilities, and information...."¹² The BOCs then proceed to try various arguments to disassociate the text from the meaning. As will be explained below, the Commission should not give credence to such creative but misplaced efforts.

¹¹ US West goes even further in denigrating the rights of its customers. US West asserts that CPNI does not belong to a customer at all, but instead is "commercial business information" with "property or commercial status" that constitutes "one of the most critical property interests of a telecommunications business." US West Comments at 2. WorldCom reminds US West that it is not called customer proprietary network information for nothing.

¹² 47 U.S.C. § 272(c)(1).

A. Section 272(c)(1) Applies To The BOCs

The BOCs' first line of defense is that Section 272(c)(1) somehow does not apply to them. This notion is clearly debunked by the explicit language of Section 272, as well as the express declaration of Part III of Title II of the Act that Section 272 is one of the "Special Provisions Concerning Bell Operating Companies."¹³ Nonetheless, the BOCs then continue with vague, unsupported claims that Section 222 provides no basis for treating the BOCs differently with respect to CPNI.¹⁴ Individual BOCs contend that Section 222 prevails over the "more generalized" provisions of Section 272(c)(1),¹⁵ that Section 272 is "completely independent of Section 222" and "irrelevant to the application of Section 222,"¹⁶ and that the Commission cannot "overlay Section 222 with an extra-statutory non-discrimination requirement."¹⁷

As WorldCom explains in its further comments, Section 222 concerns the CPNI rights of customers of all telecommunications carriers, and establishes certain procedures for all carriers to use in order to receive permission to access and use CPNI. Nowhere does Section 222 state that it is the only provision dealing with BOC use of CPNI, or that it remains completely independent from the rest of the 1996 Act. Nor is the fact that Section 272(c)(1) establishes a specific and unequivocal nondiscrimination requirement on the BOCs somehow

¹³ See 47 U.S.C. § 271.

¹⁴ BellSouth Comments at 18, 24.

¹⁵ BellSouth Comments at 2 n.5, 3 n.10.

¹⁶ SBC Comments at 6, 7.

¹⁷ SBC Comments at 9.

obviated by the generic CPNI-specific provisions of Section 222; in fact, quite the reverse. Moreover, the two provisions fit together well; while Section 272(c)(1) governs the BOCs' use and provision of CPNI until it sunsets eventually with the other separate affiliate safeguards, Section 222 would continue to apply to the BOCs after sunset. Where the BOCs are concerned, then, it is Section 222 that must be placed into the broad context of Section 272(c)(1), and not the other way around.

The BOCs next argue that certain words do not mean what they say. For example, Ameritech states that "Congress never intended CPNI to be covered by the nondiscrimination requirements of §272(c)(1)" because (so Ameritech argues) Section 272(c)(1) does not specifically mention CPNI, and Section 222 deals with CPNI comprehensively.¹⁸ US West similarly contends that the word "information" in Section 272(c)(1) does not include CPNI.¹⁹

Contrary to the BOCs' arguments, however, Section 272(c)(1) plainly includes all types of "information;" CPNI, after all, is customer proprietary network information. Further, in the Non-Accounting Safeguards proceeding, the Commission concluded that CPNI is well within the scope of "information" subject to Section 272(c)(1).²⁰ Further, pursuant to the BOCs' own logic, Section 272(g) also does not mention, and therefore does not include, CPNI, which certainly is not the BOCs' position on that issue.²¹

¹⁸ Ameritech Comments at 8.

¹⁹ US West Comments at 11. Tellingly, US West admits, in the very same page, that CPNI is "a particular type of information." Id.

²⁰ Non-Accounting Safeguards Order at para. 222.

²¹ See Section III.C below.

The BOCs make related arguments over the meaning of other language in Section 272(c)(1). US West claims that Section 272(c)(1) only covers the "provision" of CPNI, not authorization for its use; as long as a BOC is willing to provide CPNI to all authorized entities, US West opines, then the authorization process still can be discriminatory.²² Similarly, Ameritech and SBC claim that solicitation of customer consent to use CPNI should not be considered a "service" under Section 272(c)(1),²³ while other BOCs claim that BOC solicitation of customer approval to use or disclose CPNI for its affiliate does not constitute "dealings with its affiliate," as stated in Section 272(c).²⁴

Despite these claims, it is crystal clear that Section 272(c)(1) applies to all the BOC's "dealings with its affiliate," including its provision of access to, or its other use of, CPNI on behalf of its affiliate. Further, the authorization and solicitation processes certainly both come within the extremely broad universe of all "goods, services, facilities, and information" that the BOC provides for its affiliate.

In addition, Bell Atlantic and NYNEX insist that a Section 272 affiliate is an agent of the BOC which "stands in the shoes of the carrier," and that, as a result, the affiliate is not restricted by Section 222.²⁵ Of course, this view flies in the face of the plain language of Section 272(a)(1)(A), which requires an affiliate "separate from any operating company

²² US West Comments at 13.

²³ Ameritech Comments at 10; SBC Comments at 10.

²⁴ Bell Atlantic/NYNEX Comments at A-4; BellSouth Comments at 19 n.37.

²⁵ Bell Atlantic/NYNEX Comments at 6.

entity,"²⁶ and Section 272(b)(1), which requires that the affiliate "operate independently" from the BOC.²⁷ These same BOCs go on to argue that CPNI should be released to unaffiliated parties only upon written request, given the "pernicious history of slamming in the interexchange history."²⁸ The veracity of this statement aside, WorldCom submits that once the BOCs are permitted to offer in-region long distance services, there is just as much incentive and opportunity for unauthorized slamming to occur within the context of the BOC/affiliate relationship, where the BOC, as local carrier, seeks its customers' approval to switch them to the BOC's long distance affiliate.

Thus, despite the BOCs' best efforts to deny the obvious, Section 272(c)(1) applies to the BOCs. As far as the BOCs are concerned, however, this conclusion does not end the inquiry.

B. Section 272(c)(1) Prohibits BOC Discrimination

The BOCs' next line of defense is that, conceding that Section 272(c)(1) actually does apply to their activities, nonetheless the provision does not really prevent the BOCs from discriminating against unaffiliated entities. Ameritech states that, even if the provision applies,

²⁶ 47 U.S.C. § 272(a)(1)(A).

²⁷ 47 U.S.C. § 272(b)(1).

²⁸ Bell Atlantic/NYNEX Comments at 6. These BOCs claim that the Section 272 affiliate needs to be able to use the same BOC employee to access CPNI and then market and sell the BOC's service, in order to match the "entrenched... incumbent interexchange carriers," or "IIXCs." Bell Atlantic/NYNEX Comments at A-5. As far as WorldCom is aware, there is only one group of "entrenched incumbents" remaining in the telecommunications industry, and the BOCs should know themselves very well. On the other hand, IXC's churn customers competitively among themselves at the rate of tens of thousands daily.

"the end result should be the same," namely that Section 272(c)(1) "should not be interpreted as requiring identical types of customer consent because customers' privacy interests differ greatly in these two cases."²⁹ As explained above, WorldCom agrees that customers' privacy interests differ depending on the identity of the carrier. However, unlike Ameritech's proposed dichotomy, the line drawn by Congress is between all non-BOCs (governed only by Section 222) and all BOCs (governed by both Section 222 and Section 272(c)(1)).

The BOCs try to create an exceedingly narrow definition of conduct that would not satisfy the nondiscrimination requirement. US West opines that "it is not reasonable to require absolute equality of CPNI access/use through the 'approval' process,"³⁰ and that Section 272 should be deemed met once a BOC "is willing to provide CPNI to any entity authorized to receive it."³¹ In order to make this reading fit the statute, US West tells the Commission to "reconcile" Section 272 with Section 222, or in other words "narrowly construe" Section 272(c)(1).³² Ameritech argues similarly that, no matter what Section 272(c)(1) says, "the consent requirements imposed on a BOC's use of CPNI to market the services of its §272 affiliate should be no more onerous than those imposed on AT&T's or MCI's use of interLATA CPNI in the marketing of their local exchange services."³³

By crafting Section 272(c)(1), Congress has created a necessary distinction

²⁹ Ameritech Comments at 9.

³⁰ US West Comments at 10.

³¹ US West Comments at 5.

³² US West Comments at 4.

³³ Ameritech Comments at 7.

between BOCs and non-BOCs. The Commission has concluded correctly in the Non-Accounting Safeguards Order that this provision represents "an unqualified prohibition against BOC discrimination in its dealings with its section 272 affiliate and unaffiliated entities," one that poses "a more stringent standard" than the "unreasonable discrimination" standard of Section 202(a) of the Communications Act.³⁴ Contrary to the BOCs' contentions, the Commission found that this provision must be construed broadly to give it its full effect.³⁵ That same conclusion holds just as true in this proceeding.

When all else fails, of course, one can always resort to the U.S. Constitution. US West claims that the First Amendment rights of the BOCs and their customers would be violated if Section 272(c)(1) were applied to the BOCs and their affiliates.³⁶ The short answer is that US West's dispute -- whatever its merits -- is with Congress, not the FCC.

C. Section 272(g) Does Not Exempt CPNI From The Nondiscrimination Requirement of Section 272(c)(1)

The BOCs' final line of defense is that, in Ameritech's words, "BOC use of CPNI to market the services of a §272 affiliate is exempt from the nondiscrimination requirements of §272(c) because that section exempts the use of CPNI in the course of performing joint marketing or sales."³⁷ Further, the BOCs claim, transfers of CPNI from a BOC to its affiliate

³⁴ Non-Accounting Safeguards Order at para. 197.

³⁵ Id. at para. 216.

³⁶ US West Comments at 3.

³⁷ Ameritech Comments at 3; see also Bell Atlantic/NYNEX Comments at 7, BellSouth Comments at 3; SBC Comments at 4, 12; Pacific Telesis Comments at 8, 14; US West Comments at 10.

for use in joint marketing also are not covered by the nondiscrimination provisions of Section 272(c)(1).³⁸

Of course, the fact that Section 272(g) nowhere mentions "CPNI," or "information," or anything else conceivably related to CPNI, should put an end to the BOCs' arguments about some mysterious "exemption." Nonetheless, the BOCs proceed to try various semantical contentions. BellSouth argues, for example, that customer approval solicitation is part of the marketing function itself, and thus is not subject to Section 272(c)(1).³⁹ As WorldCom explains in its further comments, however, seeking permission to use CPNI, and actually using CPNI to market and sell services, are two distinctly different functions.⁴⁰

A more subtle tact of the BOCs is to argue that CPNI is so "critical" and "essential" to joint marketing and sales that it should all be considered one and the same thing. BellSouth is typical of this view, finding that "a BOC's access to its own CPNI is a critical cornerstone of both the marketing and selling functions," and that no credible argument can be made that a BOC's use of CPNI is not essential to its marketing and sales activities.⁴¹ SBC claims that CPNI is "integral to the exercise of Section 272's joint marketing freedoms,"⁴² while US West discerns a "critical nexus between joint marketing and CPNI" that renders CPNI

³⁸ Ameritech Comments at 8; Bell Atlantic/NYNEX Comments at 2.

³⁹ BellSouth Comments at 19.

⁴⁰ WorldCom Further Comments at 14-15.

⁴¹ BellSouth Comments at 21.

⁴² SBC Comments at 10.

"an inherent component" of joint marketing.⁴³ Pacific Telesis (correctly) fails to get with the program and states that, while CPNI is "very helpful," it need not be essential to joint marketing or sales.⁴⁴

WorldCom is genuinely baffled about the genesis of the notion that deeming one function or service "essential" or "critical" to another function or service somehow makes the two, for all legal and practical purposes, the same function or service. Perhaps next the BOCs will argue that, because local service is essential to long distance service, the two services are "really" local service, so the BOCs therefore are lawfully permitted to provide both services immediately. Moreover, contrary to the tone of some of the BOCs' assertions, the Act does not prohibit the BOCs outright from using CPNI in connection with their joint marketing activities. Rather, the statute merely requires prior customer authorization and nondiscriminatory provision of this uniquely valuable information to other carriers. The Commission should reject the BOCs' argument as wholly unsupported by the statute and logic. In fact, the BOCs' assertions here should further reinforce the Commission's resolve to enforce Section 272 as written. If CPNI is as essential and critical as the BOCs claim, their discriminatory use of CPNI would clearly harm consumers and nascent competitors.

D. BOC Solicitation Services Are Bound By Section 272(b)(5)

The Bureau had asked whether approval solicitation services offered by the BOCs would fall under Section 272(b)(5). WorldCom has responded in its further comments that the

⁴³ US West Comments at 12, 21.

⁴⁴ Pacific Telesis Comments at 15.

BOC affiliate, not the BOC parent, is permitted to provide approval solicitation service, and that any ruling allowing the BOCs to provide such a service must require "all or nothing" approval in order to comply with Section 272(b)(5) and Section 272(c)(1).⁴⁵

The BOCs argue otherwise. They claim first that the 1996 Act contains no requirement that the BOCs provide an "approval solicitation service."⁴⁶ WorldCom agrees, but would go further and argue that the Act prohibits the BOCs from providing such a service.⁴⁷ Various BOCs contend, for different reasons, that the solicitation of customer consent is not a "transaction" under Section 272(b)(5).⁴⁸ BellSouth claims this is so because the service is performed on behalf of itself,⁴⁹ while SBC insists that the service constitutes a transaction between the BOC and its customer.⁵⁰ Bell Atlantic and NYNEX claim that solicitation is "an arrangement between a BOC and its customer in order to meet a regulatory requirement, not a transaction with an affiliate."⁵¹ Amidst these conflicting rationales, only Pacific Telesis gets it right by concluding that BOC solicitation on behalf of its affiliate is a transaction subject to Section 272(b)(5).⁵²

⁴⁵ WorldCom Further Comments at 9-10.

⁴⁶ Bell Atlantic/NYNEX Comments at A-4; BellSouth Comments at 19-20; SBC Comments at 10.

⁴⁷ WorldCom Further Comments at 9-10.

⁴⁸ US West Comments at 23.

⁴⁹ BellSouth Comments at 23-24.

⁵⁰ SBC Comments at 15.

⁵¹ Bell Atlantic/NYNEX Comments at A-6.

⁵² Pacific Telesis Comments at 17.

Finally, many BOCs state that "requiring BOCs to solicit consent for others raises serious First Amendment concerns."⁵³ There would be no such concerns, of course, where the Commission interprets the law to prohibit the BOCs from providing such services, as WorldCom details in its further comments.

E. Section 272(e)(2) Applies To CPNI Related To BOC Provision Of Exchange Access Service

Finally, the BOCs argue that Section 272(e)(2) does not pertain to CPNI in any way because it deals only with exchange access, or what SBC calls "carrier proprietary" information.⁵⁴ WorldCom points out in its further comments that the provision reaches "any... information" concerning a BOC's exchange access services, which would include both CPNI for all exchange access customers, such as IXC's and other carriers, and those same carriers' local end user customers.⁵⁵ Thus, despite the BOCs' limiting arguments, Section 272(c)(2) covers all CPNI associated with a BOC's exchange access service, and all local customers of that service.

⁵³ Ameritech Comments at 10; see also BellSouth Comments at 19-20; Pacific Telesis Comments at 12-14.

⁵⁴ SBC Comments at 14; see Ameritech Comments at 11; Bell Atlantic/NYNEX Comments at A-5-6; BellSouth Comments at 23; Pacific Telesis Comments at 16.

⁵⁵ WorldCom Further Comments at 16-17.


IV. CONCLUSION

The Commission should act in accordance with the recommendations proposed in WorldCom's earlier set of comments, its further comments, and its reply comments above.

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